A TRACT

ON

DUELLING:

WHEREIN

The Opinions of ſome of the moſt celebrated Writers

ON

CROWN LAW

ARE EXAMINED AND CORRECTED

Either by the Authority of the *ſame Writers*, declared in contradictory Sentiments on the ſame Subject collated from other Parts of their Works,

Or, by the ſolemn Deciſions of *more ancient Writers of* (at leaſt) *equal Authority*; in order to aſcertain the due Diſtinction between

MANSLAUGHTER AND MURDER.

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M DCC XC.

"*Whoſo ſheddeth Man's blood, by Man ſhall his blood be "ſhed: for in the image of God made he Man.* (Gen. ix. 6.) "*For blood it defileth the land.*" (Num. xxxv. 33) There cannot, therefore, be any legal *Prerogative* to pardon *wilful Manſlaughter*, "but only where the King may "do it BY HIS OATH," that is to ſay, "where a Man "ſlayeth another *in his own defence*, or by *misfortune*." (2 Ed. iii.) To pardon without one or other of theſe two favourable circumſtances would be an act highly *diſloyal* to GOD and MAN, and even to THE LAND; for "THE LAND *cannot be cleanſed of the blood that is ſhed "therein, but by the blood of him that ſhed it.*" (Num. xxxv. 33.)

Cædes manifeſtæ numerantur inter ſcelera nullo humano jure expiabilia." (3 Inſt. 47.)

PREFACE.

THE intention of the following Tract is to prove that the plea of ſudden Anger *cannot remove the imputation and guilt of* Murder, *when a* Mortal Wound *is* wilfully *given* with a weapon:

That the indulgence allowed by the Courts to voluntary Manſlaughter *in Rencounters, and in ſudden Affrays and Duels, is* indiſcriminate, *and without foundation in Law:*

And that impunity *in ſuch caſes of* voluntary Manſlaughter *is one of the principal cauſes of the* continuance *and preſent* increaſe *of the* baſe *and* diſgraceful *practice of Duelling.*

Univerſal Benevolence, including gentleneſs, patience *and an unaffected* placability *in our behaviour, even towards thoſe*

men who injure and affront us, is manifeſtly required of all men, who profeſs the true religion; and yet, unhappily for the Chriſtian world, this moſt obvious doctrine of the goſpel of peace, *is too commonly either miſunderſtood, or elſe abſolutely rejected, though the* temporal *as well as the* eternal happineſs *of mankind, greatly depends upon a conſcientious and proper obſervation of it. For a man cannot be a true Chriſtian without obſerving this doctrine; and yet, ſo generally received is the oppoſite and contradictory doctrine, concerning the neceſſity of revenging every perſonal affront with ſword and piſtol, for the ſake of, what is falſely called,* honour, *that a true Chriſtian is rarely to be with! Nay, we are fallen into ſuch groſs depravity, that the writer of a late publication on* " the principles of " penal law," *has ventured to aſſert, (tho' he is in other reſpects, as I am informed, a ſenſible and ingenious young gentleman) that* " *the judge condemns the duelliſt, whilſt*

" he ſcarcely knows how in his own heart " to diſapprove his behaviour." (p. 224.) So that one would ſuppoſe Chriſtianity to be almoſt entirely extinct amongſt us, if its principles are ſo little regarded, even in our courts of juſtice, *where they ought to be held* moſt ſacred. *My readers, perhaps, will ſtart at ſuch an idea in theſe enlightened days of reformation; but I will even go farther, and venture to aſſert, that the Europeans not only ceaſe to be Chriſtians, but will no longer deſerve the name even of* men, *if they perſiſt in ſuch a brutal and diabolical contradiction to the moſt indiſpenſible principles of the laws of God and nature: for nothing deſerves to be eſteemed* human *that is* unreaſonable; *and the depravity, of which I complain, is not only incompatible with the laws of God, but abſolutely inconſiſtent with* common ſenſe.

Let us view the character of the modern man of honour *(falſely ſo called) who*

who thinks it inconſiſtent with his reputation, to paſs over a perſonal affront with that Chriſtian ſubmiſſion, which the goſpel requires of all men, without exception.

Such an one perhaps will alledge, that his honour *obliges him, whenever he receives an affront, to* call out *his adverſary, or* to accept his challenge, *leſt his* courage *ſhould be queſtioned; and therefore in ſuch caſe, the one muſt give, and the other take, what is commonly called* gentleman-like Satisfaction. *But let us examine this perverſion of words. The* Satisfaction *to both parties is the riſk both of* body *and* ſoul, *in the perpetration of a moſt* diſhonourable, baſe, *and* cowardly felony; *which cannot, therefore, be* gentleman-like, *whatever the* ſatisfaction *of it may be. And 1ſt. It is* Felony; *becauſe no man can give, or accept, a challenge, without being guilty of* Wilful Murder, *if he* kills *his antagoniſt; which I hope is proved in the courſe of the following*

following tract. 2*ndly. It is* diſhonourable, *becauſe it is an open violation of the indiſpenſible principles enjoined in the two great commandments of the ſupreme Law, viz. the* love of God, *and the* love of our neighbour: *for, in this reſpect, the offender is upon the ſame footing as culprits for* burglary, theft, *or any other felony; the* "not "having the fear of God before his eyes," *being equally applicable to all of them; and the common law of England eſteems no man qualified to be a member of ſociety, who wants this principle. The act is therefore highly* diſhonourable; *and to uſe a ſtill more humiliating term of the ſame import, I muſt obſerve—*3*dly, that it is alſo* baſe; *becauſe it affords the moſt apparent proof of a* little Soul [1]; *being,* in reality, *a* brutal *revenge;*

[1] "Nec Chriſtiani veteres hoc tantum viderunt, ſed "et philoſophi, qui dixerunt *puſilli eſſe animi contume-* "*liam ferre non poſſe*, ut alibi oſtendimus," ſays the learned Grotius, in his 2d book De jure Belli et Pacis, p. 172.

brutal

brutal *becauſe* unreaſonable; *(for how can* Honour *be vindicated or retrieved by the commiſſion of a* notorious Felony?) *and what is* unreaſonable, *muſt be diſgraceful to human nature, and therefore is truly* baſe.

And laſtly, it is cowardly (*that is, when it cannot be imputed to* Ignorance *or* Folly) *becauſe a man ſubmits to it contrary to the light of his own reaſon,* for fear *his* courage *ſhould be called in queſtion; and yet* he has not courage enough *to withſtand the barbarous prejudices of a depraved world, leſt he ſhould ſuffer ſome temporal inconveniencies: and the* ſlaviſh Fear *which he entertains of theſe (for* cowards *always dread the preſent evil moſt) deprives him of that* reaſonable fear, *which he ought to entertain of God's judgment, becauſe he thinks it at a diſtance, though, he knows, it muſt inevitably follow!---I condemn no man in particular; God forbid! I ſpeak of the queſtion only*

only in general: inveterate prejudices and cuſtoms may perhaps afford ſome excuſe in particular caſes to ſome individuals, *who have* ignorantly *yielded thereto: but as* ignorance *is diſgraceful to* humanity, *I ſincerely wiſh that all perſons may enter into as careful an examination of this queſtion as I have done, by which they will not only be enabled to avoid a repetition of their crime, but alſo be prevented from attempting to defend what is paſt, and thereby afford the beſt proof of an ingenuous and honourable heart.*

This abominable practice of duelling, which of late years has increaſed to a moſt alarming degree, may chiefly be attributed (I humbly conceive) to the improper indulgence which our Engliſh courts of juſtice, for about two centuries back, have ſhewn to perſons convicted of killing in ſudden affrays and rencounters, *through a falſe idea of mercy due to human failty, in caſes*

of ſudden provocation; *without preſerving the proper diſtinction of thoſe caſes wherein homicide, in* ſudden anger, *is really excuſable by the laws of God, and of this kingdom; and the* improper precedents, *which have ariſen from this* indiſcriminate and corrupt practice, *have ſo miſled the more modern writers on* Crown Law, *that even the greateſt and moſt reſpectable of them have been unhappily induced to admit doctrines on the ſubject of Manſlaughter, which are abſolutely incompatible with the* proper *and* neceſſary diſtinctions *to be obſerved between* wilful murder *and* manſlaughter, *which they themſelves have laid down in other parts of their works: and it is on the authority of theſe juſt* diſtinctions, *with the neceſſary conſequences ariſing therefrom, (and not on my own preſumption) that this cenſure is founded; which the following tract I hope will clearly demonſtrate.*

But

But as my readers might ſeem to give too much credit to an inconſiderable perſon like myſelf, were they, (without a previous intimation of what is propoſed,) to riſque any loſs of time in the peruſal of the arguments and proofs at large, on which my vindication for this attempt depends, I think it my duty to ſtate the ſubject and intention of the tract, as briefly as I can, in this prefatory addreſs, that my readers may, thereby, be enabled to judge, without much loſs of time, whether the matter is of ſufficient conſequence to merit any more of their attention.

I have already mentioned my opinion, that "*No man can give or accept a challenge* "*to fight* with weapons, *on any private* "*difference whatever, without being guilty* "*of* wilful murder *if he* kills *his antag-* "*oniſt.*" *And the intention of the following tract is to ſhew, that the writers on Crown Law have no juſt warrant for ad-*

and malicious intention *is neceſſarily included in the act, even though the fatal blow be given merely with* the hand, *or a* ſmall cane *or* ſtick, *which I have before mentioned as pardonable caſes, when the* killing *is not intended; for a* voluntary ſtriking, *without intention to kill, is indeed pardonable, though death enſues; but a* voluntary killing *is ſo far from being ſo, that the law, according to Lord Coke's own rule,* implieth malice; *and, conſequently, the ſame muſt, neceſſarily, be eſteemed* Murder, *and not merely* Manſlaughter; *becauſe the neceſſary marks, whereby* manſlaughter *ought to be diſtinguiſhed, are abſolutely wanting therein: for* manſlaughter *muſt be "without* malice *expreſs or implied"* (1 *Hale* 466. 4 *Blackſtone* 191) "Murder *being aggravated" (ſays Lord Hale) "with ma-*"*lice preſumed or* implied, *but manſlaghter* "*not." And yet all theſe great and excellent lawyers have unhappily fallen into the ſame error of treating the* voluntary branch *of killing,*

killing, as bare Homicide, *or* manſlaughter; *whereas, all the older writers agree, that* killing *is pardonable only in caſes* of inevitable neceſſity *(Bracton, lib.* iii. *c.* 4. *p.* 120. *b. Fleta lib.* i. *c.* 23.) *And the learned Judge Staunford ſays* " *That the* " *whole matter conſiſts in the* inevitable ne- " ceſſity; *without which the* killing *is by* " no means excuſable [2], *(n'eſt aſcun voi ex-* " *cuſable.*" *P. C. lib.* i. *c.* 7.)

Now, the abſurd and depraved notions of honour, *and* gentleman-like ſatisfaction, *of which I complain, could not poſſibly exiſt, if every conqueror in a duel, who kills his antagoniſt, was ſure of being* hanged up *as an ignominious* felon, *for his own* gentleman-like ſatisfaction; *and therefore I apprehend, that the diabolical practice of ſettling private differences with ſword and*

[2] There is but one caſe of *voluntary Killing*, wherein the plea of *ſudden Anger* and atrocious provocation may ſeem entitled to ſome indulgence and conſideration: See Note in p. 46.

piſtol

piſtol is chiefly to be attributed to the want of puniſhment due to voluntary manſlaughter, *through the miſtaken conceſſions of the Writers on Crown Law, and the falſe mercy of Juries, in conſideration of* ſudden anger; *becauſe* impunity *foſters vice and depravity; but more eſpecially in caſes of* wilful manſlaughter, *impunity ought to be eſteemed the bane of ſociety; as* the guilt of blood *is thereby thrown upon a whole nation or country; for it is a ſupreme law, that* "*whoſo ſheddeth* man's blood, *by* man "*ſhall* his blood *be ſhed.*" *Gen.* ix. 6. "*For* blood *it defileth the* Land: *and* "*the* Land *cannot be cleanſed of* the Blood "*that is ſhed therein, but* by the Blood "of him that ſhed it." (Num. xxxv. 33.) *And I hope I have proved by incontrovertable extracts from the laws of God, that the ſaid judgment is inevitably incurred by all* voluntary killing, *except in the legal proſecution of juſtice, and in the neceſſary defence of our lives and properties; ſo that* no

man *has any legal or juſt right to pardon or re-mit the puniſhment due to* murder, *or* voluntary manſlaughter *(which are the ſame crime, and equally* unpardonable *in this world)*; *for ſuch an indulgence is not only a manifeſt ſin againſt Almighty God, but alſo againſt the community at large, or* country; "*for* "Blood *it defileth the* land; *and the* land "*cannot be cleanſed of* the blood *that is ſhed* "*therein, but* by the blood of him that "ſhed it." *Numb.* xxxv. 33. *This is not a ceremonial law, but a law of morality, founded in* divine Juſtice, *which muſt, there-fore, be ever binding. Now as* "*the* "Land cannot be cleanſed, &c. but by

manſlaughter, ſo that even *the king himſelf* is abſolutely reſtrained from it. See an act of the 2 Edw. III. whereby it is ordained, that a charter of pardon "ſhall "not be granted, but only where the king may do it "by his oath; that is to ſay, where a man ſlayeth an-"other in *his own defence*, or *by misfortune*." See alſo a Note in p. 48. on the further limitation of Royal Prerogative by a ſubſequent Statute of 13 Ric. 2. (2 Stat. c. 1.) rendering it obnoxious to *the wrath of God!*

" the blood of him who ſhed it," *the* Land *is ſurely entitled to that expiation, as a matter of* indiſpenſible Right, *which, when withheld or withdrawn by* Charters of Pardon *to the guilty, is a manifeſt* injury *and* wrong *to the* land, *i.e. to the whole Country or Kingdom; which opens to us the true ground and reaſon why the Royal Prerogative is ſo ſtrictly and expreſsly limited in this point; for* " Non poteſt Rex gratiam facere cum " injuriâ et damno aliorum :" *This is an ancient and conſtant rule* " *of Law.*" (3 Inſt. p. 236.) *and an* injury, wrong, *or* damage *is ſurely* moſt intolerable, *when it is liable to affect the whole* Land *or* Country, *by rendering it obnoxious to* the wrath of God!

I may probably be charged with an unpardonable temerity for preſuming to cenſure the writings of ſome of the greateſt and moſt learned men that this nation, perhaps, ever produced; and I am thoroughly ſenſible of

the riſk and ill conſequences to myſelf, in caſe I am miſtaken; but a ſincere perſuaſion of being in the right, (ariſing from a laborious reſearch and careful examination of the moſt celebrated and approved writers on Crown Law) obliges me to prefer, what I conceive to be truth, *before the authority of the greateſt names.*

And even, though I ſhould not have ſucceeded according to my own conceptions of the ſubject, yet, I truſt, that my impartial readers will pardon any involuntary errors, *that they find in the performance, eſpecially if they ſee no cauſe to ſuſpect any want of uprightneſs in the intention of it: and, at all events, I hope, that the attempt may, at leaſt, be conſidered as a proof, that I am not afraid of difficulties and labour, nor of the riſk of perſonal inconveniences, when I undertake any point with a view of ſerving my country, or mankind in general.*

London.
3d Sept. 1773

GRANVILLE SHARP.

A

TRACT

ON

DUELLING.

NO MAN can give or accept a challenge to fight *with weapons*, and *kill* his antagoniſt (on any private difference whatever) without being guilty of *Wilful Murder*, ſuch as ought to be excluded from the benefit of clergy. For *Wilful Murder* is the killing of a man *ex malitiâ præcogitatâ*[a]; which *malice* is either *implied* or *expreſs*,[b] or, as judge Hale calls

[a] Pleas of the Crown 1678, p. 35. alſo 1 Hal. P. C. 425.

[b] Fitzherbert's Juſtice of Peace, p. 21. Lambard's Eirenarcha, c. 7. p. 240. alſo 3 Inſt. c. vii. p. 47.

it, *Malice in Law*, or *ex presumptione Legis* [c]; and *malice* must necessarily be *implied* when a man *wilfully strikes* or wounds another with any *offensive weapon* whatever, because that is "an act that "must apparently introduce harm" [d], and the intention to do harm *makes it murder* [e]; so that the allowance which the writers of the two last centuries have made for *sudden anger* (without preserving a proper *distinction* of the case wherein it really deserves consideration) is unjust in itself, as well as dangerous to society; for few men would entertain such absurd notions of honour, as to think themselves obliged to revenge affronts with their *swords* or *pistols*, if the risque of being hanged up as felons and murderers for their own *gentleman-like satisfaction*, was rendered obvious by

[c] 1 Hal. P. C. 451.

[d] P. C. 1678, p. 36. [e] Ibid. 36.

just

juſt and proper deciſions of the Law on this point.

" In every charge of murder, *the fact* " *of killing being firſt proved,* all the cir- " cumſtances of Accident, Neceſſity, " or Infirmity are to be ſatisfactorily " proved by the priſoner, unleſs they " ariſe out of the evidence produced " againſt him : for the law preſumeth " the fact to have been *founded in malice,* " until the contrary appeareth." Judge Foſter, 255.

The caſes of homicide which are juſtified or excuſed by the above-mentioned *circumſtances* of *Accident* and *Neceſſity,* are well underſtood, and, by many eminent writers, ſufficiently explained under the heads of *Misfortune* and *Self-defence.* But with reſpect to thoſe caſes of Homicide, which are attended with

circumſtances of *infirmity* (the third branch of circumſtances mentioned above) the writers on crown law in general have been *very indiſcriminate*, notwithſtanding that the true diſtinction between *Murder* and *Manſlaughter* depends entirely on a clear ſtating of thoſe caſes of *infirmity*, which really deſerve conſideration and excuſe.

Judge Foſter, indeed, is, for the moſt part, nice and accurate in his diſtinctions; yet he has paid ſo great a regard to the authority of *precedents*, that he has been unwarily led away (as well as other writers) from the neceſſary concluſions of *his own arguments* upon this point; I ſhall, nevertheleſs, make uſe of his words as far as they expreſs my own opinion of the ſubject.—" Whoever " would ſhelter himſelf under the plea " of *Provocation* muſt prove his caſe " to the ſatisfaction of the jury. The

" presumption of law is against him, " till that presumption is repelled by " contrary evidence. What degree of " *Provocation*, and under what circum- " stances heat of blood, the *Furor bre-* " *vis*, will or will not avail the De- " fendant is now to be considered.

" Words of Reproach, how grievous " soever, are not a Provocation suffi- " cient to free the Party killing from " the *guilt of murder*. Nor are inde- " cent provoking actions or gestures " expressive of contempt or reproach, " *without an assault upon the person.*" (p. 290.) But I think myself obliged to add that even *an assault* * *upon the person* is NOT " a Provocation suffi- " cient to free the Party killing from " the *guilt of murder*," (though this

* See my Remarks (in p. , &c.) on Mr. Hawkins's assertions relating to this point.

learned

learned judge ſeems to think otherwiſe. See Sect. iii. p. 295) unleſs all the circumſtances which are neceſſary to render it excuſable by the plea of *ſelf-defence* can clearly be proved. For if *the Killing* in a ſudden fray is not *ex neceſſitate*, (as in Self-defence, or in the lawful Defence of others), it muſt be eſteemed *voluntary*; and *voluntary* is the ſame thing as *wilful*; which neceſſarily includes *malice*. For Bracton ſays, "Crimen non contrahitur niſi *Voluntas* "*nocendi* intercedat & voluntas et propoſitum diſtinguunt *Maleficium*," &c. "The Guilt is not incurred unleſs the "*intention of injuring* intervenes, for "*the Intention and Purpoſe* (or deſign) "marks the *Felony* (or malicious Deed.)" Lib. iii. c. 17. So that *malice* muſt neceſſarily be *preſumed*, whenever the *killing* is not *ex neceſſitate*, eſpecially if the fatal blow be *wilfully* given with *a weapon*; for in that caſe a man muſt neceſſarily

neceſſarily be ſuppoſed to ſtrike, " *cum* " *occidendi animo*,—with murderous in- " tent," becauſe the *Voluntas nocendi* is apparent; and, conſequently, the *malice*, in ſuch a caſe, is not only *implied* but clearly *expreſſed*; ſo that the *ſudden anger* is only a further proof of *the malice* and " *intention* to do harm."

Bracton has accurately laid down the proper diſtinction to be obſerved in the plea of *an excuſable Neceſſity* for killing.

" Quo caſu diſtinguendum eſt utrum " *Neceſſitas* illa fuit *evitabilis* vel non. Si " autem *evitabilis*, et evadere poſſet abſ- " que occiſione, tunc erit *reus homi-* " *cidii*," (and a felonious *homicide* or *manſlaughter*, in the days of Bracton, had the ſame meaning that we now apply to *Murder*). " Si autem *inevi-* " *tabilis*, quia occidit hominem ſine " odii meditatione *in metu & dolore* " *animi*,

" *animi*, ſe et ſua liberando cum aliter" (*mortem propriam* Fleta, lib. i. c. 23.) " evadere non poſſet, non tenetur ad " pœnam homicidii *." Bract. lib. iii. c. 4. And Staunford remarks, that *the neceſſity* ought to be ſo great, that it ought to be eſteemed *inevitable*, or otherwiſe it ſhall not be excuſed; ſo that the whole matter conſiſts (ſays he) in the *inevitable neceſſity*, without which the *killing is by no means excuſable*[f]; ſo that

* " In which caſe it is neceſſary to diſtinguiſh " whether that *Neceſſity* was *avoidable* or not; for " if it was *avoidable* and might have been *evaded* " without Killing, then he ſhall be guilty of " *Manſlaughter*," (i. e. Murder in thoſe days); " but if it was *inevitable*, for that he killed the " man without (any) prepence of hatred, (but) *in* " *fear and grief of Mind*, in delivering himſelf and " his own, when otherwiſe he could not eſcape, he " ſhall not," (in ſuch caſe) " be held (or be liable) " to the penalty of Murder."

[f] Nota que la neceſſite doit etre cy graunde; que il doit eſtre exiſtimé *inevitable*, ou autrement il n'excuſera, &c. eins tout la matier conſiſt in le *inevitable neceſſite*,

that the learned Judge Foſter certainly goes too far, when he inſinuates, in the paſſage before cited, "that *an* "*aſſault* upon the perſon" (without mentioning the neceſſary exception concerning *inevitable Neceſſity*) "is a pro-"vocation ſufficient to free the party "killing from the guilt of murder." For a farther diſtinction (beſides that of *inevitable neceſſity*) is alſo to be obſerved, which is very accurately laid down, even by judge Foſter himſelf, in p. 291, though the ſame would be uſeleſs, if *an aſſault upon the perſon* was to be admitted as a *ſufficient provocation* to the act of *killing*. "It ought to be "remembered (ſays he) that in all "other caſes of homicide upon ſlight "provocation[g], if it may be reaſonably

neceſſité, ſans quel, *le tuer* n'eſt *aſcun voi excuſable*. Staunford, P. C. lib. i. c. 7.

[g] But I have already ſhewn that *no provocation* whatever can juſtify a *voluntary* or *wilful killing*.

" collected *from the weapon* made uſe of,
" or from any other circumſtance, that
" the Party *intended to kill*, or to do
" ſome great bodily harm, *ſuch Homi-*
" *cide* will be Murder. The miſchief
" done is irreparable, and the outrage
" is conſidered as flowing rather from
" *brutal rage* or *diabolical malignity*,
" *than from human frailty*. And it is
" to *human frailty*, and to that alone,
" the Law indulgeth in every caſe of
" felonious Homicide."

The firſt inſtance which he gives by way of illuſtration to this doctrine is cited from Judge Hale, vol. i. p. 473. " If *A.* come into the wood of *B.* and " pull his hedges, or cut his wood, and " *B.* beat him, whereof he dies, this is " *manſlaughter*, becauſe, though it was " not lawful for *A.* to cut the wood, " it was not lawful for *B.* to beat him, " but either to bring him to a Juſtice

" of Peace, or puniſh him otherwiſe " according to law." But here Lord Hale is not ſufficiently diſtinct in ſtating the caſe; becauſe circumſtances are wanting, which are neceſſary for the determination of ſuch a caſe, whether it ought to be eſteemed *manſlaughter* or *murder*. The accurate Judge Foſter was ſenſible of this want of *neceſſary circumſtances*, and therefore adds, " But " it muſt be underſtood (ſays he) that " he beat him, *not with a miſchievous* " *intention*, but meerly to chaſtiſe him " for the treſpaſs, and to deter him from " committing the like. For if he had " knocked his brains out with *a bill or* " *hedgeſtake*, or had given him *an out-* " *rageous beating* with an ordinary cud- " gel beyond the bounds of a *ſudden* " *reſentment*, whereof he had died, *It* " *had been Murder*. For theſe circum- " ſtances are ſome of the genuine ſymp- " toms of the *Mala Mens*, the heart

" bent upon miſchief, which, as I " have already ſhewn, enter into the " true notion *of Malice* in the legal " ſenſe of the word." P. 291.

The next inſtance he mentions is that of the parker tying the boy to his horſe's tail. Which was (ſays he) " *held to be* " *murder.*" " For it was a deliberate " act, *and ſavoured of cruelty.*" But the third inſtance, viz. that of Stedman the ſoldier killing a woman *with a ſword* (which Judge Foſter mentions as a caſe that *was held clearly to be no more than manſlaughter*) was, moſt certainly, *wilful murder:* for tho' it appeared that the woman had ſtruck the ſoldier on the face with an iron patten; yet ſhe afterwards fled from him, and he " *purſuing* her, *ſtabbed her in the back.*"

Now if ſuch a caſe of *wilful killing* is to be eſteemed only manſlaughter, it entirely

entirely perverts the juſt arguments already quoted from the ſame author concerning the caſes wherein *human frailty* deſerves to be *indulged!* May I not uſe his own words againſt him? That "theſe circumſtances" (the purſuing, and ſtabbing the woman in the back) "are ſome of the genuine ſymptoms of the *mala mens*, the *heart* "*bent upon miſchief.*" Whereas, if he had *ſtruck her* merely with his fiſt, or with a ſmall ſtick *not likely* to kill, and had unluckily, and againſt his *intention*, *killed*, it had been but *manſlaughter*. For this is the neceſſary diſtinction for which I contend *in all caſes of killing* where the *ſtriking* (not the killing) is *voluntary:* and I cannot ſo well expreſs my meaning as in the words of Judge Foſter himſelf, though that ſenſible and acute reaſoner is afterwards miſled from the truth of his own doctrine, by

paying

paying too much regard (I mean an *indiſcriminate* regard) to the practice of the Courts, which, in this point, has frequently been erroneous.

In page 290, after the 1ſt ſection (already quoted) concerning the circumſtances, which "are not a provocation ſufficient to free the Party "Killing from the Guilt of Murder," he adds, "This rule will, I conceive "(ſays he) govern every caſe where the "Party Killing upon ſuch provocation "*maketh uſe of a deadly weapon*, or "otherwiſe *manifeſteth an intention to* "*kill*, or to do ſome ſome great bodily "harm. But if he had given the other "a box on the ear, or had ſtruck him "with a ſtick or other weapon *not likely* "*to kill*, and *had unluckily and againſt* "*his intention* killed, it had been but "*manſlaughter*. The difference between "the caſes is plainly this. In the for-

"mer,

" mer, *the malitia, the wicked vindictive* " *disposition* already mentioned, *evidently* " *appeareth:* in the latter it is *as evidently* " *wanting*. The Party, in the first trans- " port of his passion, intended to chas- " tise for a piece of insolence which " few spirits can bear. In this case the " benignity of the law interposeth in " favour of human frailty; in the other " its justice regardeth and *punisheth the* " *apparent malignity of the heart.*" P. 290 and 291.

Nevertheless, the same author, in p. 296, endeavours to excuse killing in *sudden rencounters*, without preserving this necessary distinction concerning " *the use of a deadly weapon,*" and " *the* " *intention to kill.*"

" To what I have offered (says he) " with regard to *sudden rencounters*, let " me add, that the blood, already too " much

" much heated, kindleth afreſh at every " paſs or blow. And in the tumult of " the paſſions, in which *meer inſtinct* " *ſelf-preſervation*, hath no inconſider- " able ſhare, the voice of reaſon is not " heard. And therefore the law, *in* " *condeſcenſion* to the infirmities of fleſh " and blood, hath extenuated the of- " fence." But *the Law*, in reality, makes no ſuch *condeſcenſion*, though *the Courts of Law* have, indeed, *indiſcriminately* done ſo, and have occaſioned a multitude of bad precedents, wherein *wilful murder* has been excuſed under the name of *manſlaughter*; and this unhappy difference between *the Law*, and the corrupt practice of *the Courts*, with reſpect to this point, has unwarily led the more modern writers on crown-law into conceſſions, which are abſolutely *contradictory* to the juſt doctrines laid down in other parts of their excellent works.

When

When I ſpeak of ſuch reſpectable and juſtly revered authors as Sir Edward Coke, Sir Matthew Hale, Lord Chief Juſtice Holt, &c. No perſon can conceive that I am miſled by perſonal or party prejudice againſt their opinions; and as I have, really, the higheſt eſteem and veneration for their memory, not only as great and learned lawyers, but as true patriots, and, above all, as ſincere Chriſtians, and worthy honeſt men, I ſhould not preſume to controvert any point that has been laid down by ſuch excellent lawyers *(ſo accompliſhed as above)* was I not armed by *their own authority*; for *no other authority* is ſufficiently authentic for the purpoſe of correcting ſuch deſervedly eſteemed writers; though I muſt acknowledge my obligation to the *more ancient* writers for the diſcovery of the errors of which I complain.

The proper diſtinction to be obſerved

 between

between *murder* and *manſlaughter* is well laid down by Sir Matthew Hale. "*Mur-*
"*der*" (ſays he) "being aggravated with
"malice *preſumed* or *implied*, *but man-*
"*ſlaughter* Not." 1 Hale's P. C. 466 *.

This rule is good and unexceptionable; and therefore it muſt appear, that even Sir Matthew Hale himſelf is miſtaken in the paragraph preceding this quotation, where he ſays that "*Man-*
"*ſlaughter*, or *ſimple homicide*, is the *vo-*
"*luntary killing* of another without *ma-*
"*lice expreſs* or *implied:*" for though there may be a *voluntary ſtriking* without *malice*, yet I hope I have already proved, that there cannot be a *voluntary killing*

* See alſo the Statute 52 Hen. 3. c. 25. made at Marlbridge, A. D. 1267.—Title. "What kind
"of *Manſlaughter* ſhall be adjudged *Murther*. Mur-
"ther from henceforth ſhall not be judged before our
"juſtices, where it is found *misfortune* only, but it
"ſhall take place in ſuch as are *ſlain by felony*, and
"not otherwiſe."

without *malice expreſs* or *implied*, except in the legal execution of juſtice, and in the caſe of *ſelf-defence* and its ſeveral branches, which ſome writers (rather improperly have, indeed, called *voluntary* [a], though they proceed from an *inevitable neceſſity* [b]. Nevertheleſs even the great Sir Edward Coke (and before him the learned Lambard in his Eirenarcha, p. 250.) was guilty of this ſame impropriety of expreſſion. "Some manſlaughters" (ſays Sir Edward Coke, 3 Inſt. cap. viii. p. 55.) "*be voluntary*, and not of *malice* "*forethought*, upon ſome *ſudden fall-*"*ing out*. Delinquens per iram pro-"vocatus puniri debet mitius [c]. And "this for *diſtinction ſake* (ſays he) is "called *manſlaughter*." But it is a very *indiſcriminate diſtinction* (if I may

[a] Lambard's Eirenarcha 255. Sir Edward Coke's 3 Inſt. p. 55 and 56.

[b] See the note in page 4.

[c] He who, provoked by anger, offends, ought to be more mildly puniſhed.

uſe ſuch an expreſſion concerning the writings of ſo great a man,) becauſe the maxim "Delinquens per iram," &c. can only be admitted in caſes where the *malice* is *neither expreſs* nor *implied:* for inſtance, when the *Striking* is *voluntary*; but the *Killing*, or *Manſlaughter*, is *involuntary*, and *unexpected*; as when a man, *in ſudden anger*, gives an unlucky blow merely with his fiſt, or with a ſmall ſtick, or ſmall ſtone,[d] (meaning only

[d] See judge Foſter's comment on Rowley's caſe, wherein the difference of ſtriking with a *dangerous weapon*, and with a ſmall ſtick, or *cudgel not likely to deſtroy*, is well expreſſed, pages 294 and 295. "I "have always thought Rowley's caſe (ſays he) a very "extraordinary one, as it is reported by *Coke*, from "whom *Hale* cites it. The ſon fights with another "boy and is beaten; he runs home to his father all "bloody; the father takes a ſtaff, runs three quarters "of a mile, and beats the other boy, who dieth of "this beating. This is ſaid to have been ruled man-"ſlaughter, *becauſe done in ſudden heat and paſſion*," (for which he cites 12 Rep. 87. and 1 Hale 453) "Surely

only to correct) which, *undesignedly*, occasions death; for, in such cases, the *malice*

"Surely" (continues judge Foster) "the provocation was not very grievous. The boy had fought "with one who happened to be an overmatch for "him, and was worsted; a disaster slight enough, "and very frequent among boys. If upon this provocation the father, after running three quarters "of a mile, had set his strength against the child, "had dispatched him with *an hedgestake* or *any other* "*deadly weapon*, or by repeated blows with his cudgel, "it must, in my opinion, *have been murder*; since "any of these circumstances would have been a plain "indication of the *malitia*, that mischievous vindictive motive before explained. But with regard to "these circumstances, *with what weapon*, or to *what* "*degree* the child was beaten, *Coke* is totally silent. "But *Croke* setteth the case in a much clearer light, "and at the same time leadeth his readers into the "true grounds of the judgment. His words are, "Rowley struck the child with a *small cudgel* (God-"bolt calleth it a rod, meaning, I suppose, a *small* "*wand*) of which stroke he afterwards died. I "think it may be fairly collected from *Croke's* man-"ner of speaking, that the accident happened by *a* "*single stroke* with a cudgel *not likely to destroy*, and

that

malice is not *implied*; whereas, in a *voluntary homicide*, even a *Malice prepenſed* is implied, according to Sir Edward Coke's own definition of that term, viz. "That it is *voluntary*, and of ſet purpoſe, *though it be done upon a* "*Sudden Occaſion*: for if it be *Volun-* "*tary*, the law *implieth Malice*," 3 Inſt. c. xiii. p. 62.—Sir William Blackſtone has alſo fallen into the ſame error in his 4th vol. chap. xiv. p. 191. where he informs us that Manſlaughter is "the un- "lawful killing of another, without "malice either *expreſs* or *implied*: which "may be either *voluntarily* upon *a ſudden* "*heat*; or involuntarily, but in the

"that death did not immediately enſue. The ſtroke "was given in heat of blood, and not with any of "the circumſtances which import the *malitia*, the "malignity of the heart attending the fact already "explained, and therefore *Manſlaughter*. I obſerve "that Lord *Raymond* layeth *great ſtreſs* on this cir- "cumſtance, *That the Stroke was with a Cudgel not* "*likely to Kill.*

com-

commiſſion of ſome *unlawful act*." In both of which he is alſo miſtaken; for, with reſpect to the latter, his doctrine cannot be admitted, except in caſes where the circumſtances of the *unlawful act* amount only to *a bare treſpaſs*[c]. For

[c] Which he himſelf elſewhere allows.

Judge Foſter in his ſecond diſcourſe of homicide, p. 258. where he treats of *involuntary homicide* in the commiſſion of an *unlawful act*, informs us, "that "if it be done in the proſecution of a *felonious intention* it will be *Murder*, but if the intent went no "farther than to commit *a bare treſpaſs*, Man-"ſlaughter. Though I confeſs (ſays he) Lord Coke "ſeemeth to think otherwiſe." That is, Lord Coke did not even make an allowance for "*a bare treſpaſs*," but ſeems to have been of opinion, That every caſe of *involuntary homicide* is to be treated as *Murder*, whenever the act which occaſions death may be eſteemed *unlawful*. See 3 Inſt. p. 56. to which judge Foſter refers. But that learned judge could not mean, that he differed in opinion from Lord Coke concerning the firſt caſe there ſtated under the head of *unlawful*, viz. the unlawful ſhooting at a deer, whereby a boy was killed by the glance of the arrow; becauſe that caſe muſt neceſſarily be eſteemed *Murder* according

For I propoſe, in the courſe of this tract, to mention ſeveral allowed caſes, on good

cording to judge Foſter's own rule above-mentioned; for Lord Coke has clearly ſtated a *felonious intention*, viz. " A. meaning *to ſteal* a deer in *the park* of B. " &c." It muſt therefore appear, that he refers only to the 2d caſe, there mentioned, of a man ſhooting at a cock or hen, or any *tame fowl of another man's*; for a perſon might wantonly ſhoot at another man's pigeons, or poultry, without any intention to *ſteal them*; which, I conceive, would amount, to no more than *a bare treſpaſs* in judge Foſter's ſenſe of the word; becauſe " voluntas et " propoſitum diſtinguunt maleficia; *furtum* vero non " committitur *ſine affectu furandi.*" Fleta, lib. i. c. 33. p. 48. Whereas if Lord Coke had added, in the ſuppoſed caſe, that there was an intention *to ſteal* the tame fowl, Judge Foſter could not, reaſonably, have diſſented from his opinion; becauſe the crime muſt neceſſarily have been adjudged *Murder* according to his own rule; for the very ſame caſe has been ſo laid down by Lord Chief Juſtice Holt in a very clear manner, (ſee pages 56 and 57 of this tract) in order to explain Lord Coke's aſſertion; though Judge Holt himſelf is, as apparently, miſtaken in his Judgment of the other Caſe wherein the occaſion was an

intention

good authority, wherein even the *involuntary* or undeſigned killing is not deemed *manſlaughter*, but *murder*, when the acts, which occaſioned death, were *unlawful:* and, with the reſpect to the former, it is a manifeſt *inconſiſtency*, in all theſe great writers, to rank *voluntary killing* under the head of *manſlaughter*, in the modern *confined* ſenſe of that *once general* term; becauſe a *voluntary killing* (except in the caſe of *ſelf-defence*,

intention to *ſteal a Deer*, which is, at leaſt, as *felonious* as the intention of *ſtealing a Hen*, that is, if the Deer be tame and *incloſed* in *a Park* (as ſtated by Lord Coke) by which the *property* is rendered apparent: but if the caſe had been ſtated that the Deer was in a *Foreſt* or open chaſe, the offence *(without the accident)* would be only a *Treſpaſs*, (See Hawkins P. C. Book i. c. xxxiii. § 26); and the idea of this latter poſition may probably, have occaſioned Lord Holt's miſtake; for this circumſtance would have rendered the *accidental Killing* of the Boy, only *Manſlaughter*, agreeable to his opinions. Compare pages 54 and 57, wherein Lord Holt's opinions of theſe two Caſes are mentioned.

through inevitable neceſſity, which ſome writers have, rather improperly, called *voluntary* [f]) is certainly the ſame thing as a *wilful killing*; and either of them muſt be allowed to be the proper definition of what we now underſtand by the term *Murder* (though the meaning of that word was, originally, very different. See le Mirroir de juſtice, 1642, c. i. ſect. xiii. p. 104. and Lambard's Eirenarcha, c. vii. p. 239.) becauſe, in "*a voluntary or wilful killing*, *malice* is "neceſſarily *implied*;" and, conſequently, *voluntary killing* is excluded from the favour due to manſlaughter by the rule

[f] Lambard's Eirenarcha 255. "The laſt member (ſays he) of *voluntarie homicide* is where one man killeth another in his *own defence*, &c." and Sir Edward Coke, ſpeaking of ſelf-defence in 3 Inſt. p. 55 and 56, ſays, "this is *voluntary*, and yet no felony." Sir Matthew Hale is more accurate; for when he ſpeaks of homicide *ex neceſſitate*, he informs us "that this "neceſſity makes the homicide not *ſimply voluntary*, "but mixed, partly voluntary and partly involuntary, "and is of two kinds," &c. 1 vol. 478.

which theſe learned writers themſelves admit, *viz.* "that manſlaughter is without malice *expreſs* or *implied*;" ſo that they are really guilty of a *contradiction in terms*; becauſe the *malice*, or *intention of killing*, is *undeniable*, if the *killing* be *voluntary*[g]: and therefore, as it is a maxim that "Allegans contraria non eſt "audiendus" (Jenk. Cent. fo. 16.) I am compelled to reject the definition of *manſlaughter* given by theſe learned writers, as far as it is contradictory to to that excellent rule, already cited, for the diſtinction of *manſlaughter* from *murder*, which they themſelves admit, viz. that "*manſlaughter is without malice* "*expreſs or implied.*"

The errors, of which I complain, were not originally occaſioned by theſe cele-

[g] "And where a man doth any cruel and *voluntary* "*act* whereby death enſues, *it is murder*, *though done* "*of a ſudden.*" See a little book dedicated to Lord Bathurſt in 1724, intitled, The *Laws* of Liberty and Property, p. 67.

brated authors, but by a previous *corrupt practice in the courts*, which had been introduced by degrees, and at laſt unhappily prevailed, through a falſe idea of mercy and conſideration for *ſudden anger*; and alſo through the want of preſerving the *proper diſtinction* of caſes, wherein *manſlaughter* in *ſudden anger* is really excuſable. The proper diſtinction to be obſerved is, when the *intention* of *killing* is not neceſſarily *implied* in the act itſelf; as when a man ſtrikes another merely with his hand, in ſudden anger; or thruſts him ſuddenly from him, whereby he falls and receives a hurt, which occaſions death; in theſe, and ſimilar caſes, the ſtriking, or thruſting is, indeed, *voluntary*, yet the *killing*, or *manſlaughter*, is not ſo, but entirely undeſigned and unexpected; which proper and neceſſary diſtinction the Law Commentators have unhappily neglected. For, though the act of *ſtri-*

king

king or thruſting in anger bears ſome reſemblance to *malice*, and though ſuch an act is certainly *unlawful in itſelf*, yet it is reaſonable to make ſome allowance for the frailty of human nature, and the ſudden paſſion of a man that is provoked, whenever *a more criminal malice* is not neceſſarily *impiled* in *the act itſelf*, which occaſions death. And in this lenity we are juſtified by the laws of God, whereby ſuch caſes of manſlaughter *in ſudden anger*, as I have mentioned, were excuſed without any other penalty than that of baniſhment to a city of refuge. "If he "*thruſt* [h] him *ſuddenly* (בִּפְתַע) without

[h] *The thruſting*, here mentioned (which ſome writers ſeem to have miſunderſtood) does not mean a *thruſt* with a ſword or other weapon; for the word הדף has no ſuch meaning, but properly ſignifies a violent thruſting or ſhoving away, as with the hand; or a ſudden driving away, as chaff is drove before the wind, as Bythner remarks, "Proprie dicitur de vento, qui rapta proſequitur." Lyra prophetica, p. 6.

enmity

" *enmity*[1] (בלא איבה Numb. xxxv. 22.)
" — the congregation ſhall reſtore him
" to the city of his refuge, &c." v. 25.)
Yet the very ſame action, if done *in hatred*, (בשנאה ſee the 20th verſe) and even a blow with the hand *in enmity*, (באיבה ſee the 21ſt verſe, apparently meaning, when there was an *expreſs proof of malice*, or intention to kill,) were to be deemed *unpardonable*; " he ſhall ſurely die."

But, it is remarkable, that theſe are the *only* two *caſes* wherein *an expreſs proof of malice* was required; for in all the examples given in the ſame chapter of killing *with a weapon*, or with *a ſtone wherewith a man may die*, (meaning ſuch a ſtone as from its ſhape or ſize might be deemed a ſufficient weapon to occaſion death) there is not the leaſt men-

[1] Here a proper diſtinction is preſerved between *ſudden anger* and *enmity*.

tion

tion made of *malice* (שנאה Hatred, or איבה Enmity) which is a ſufficient proof that the ſame were neceſſarily *implied* from the ſtroke, when given with a *weapon*; for, in that caſe, the command was peremptory. "If he ſmite "him with an inſtrument of iron, ſo that "he die, he is a *murderer* (רצח Retſch, or Killer, perhaps from thence the Engliſh word *wretch*) "the *murderer*[k] "ſhall "ſurely

[k] The Word *Murder* was anciently underſtood in the ſame *general ſenſe*, as the Hebrew רצח to kill; ſo that Judge Foſter is miſtaken when he ſays (p. 307.) that "*our oldeſt* writers made uſe of the term *murder* "in a very narrow limited ſenſe." The Senſe was *afterwards*, indeed, reſtrained to *hidden* manſlaughter, whereof the author was not known; but in later times it was, ſtill once more, changed to the ſenſe in which it is at preſent underſtood, viz. that of *wilful manſlaughter*, wherein "*malice prepenſed*" is either *expreſs*, or *implied*. See Lambard 2 Book c. vii. p. 239 and 240. "In old time (ſays he) every killing of one man "by another, was (of the effect) called *murder*, becauſe "death enſued of it. For (as Poſtellus noteth) of the "Hebrew word *Moth* came the Latine *Mors* and "thereof

" ſurely be put to death :" (v. 16.) the ſame alſo, if he ſmote him with " *a* " *ſtone wherewith he may die,)* or with " *an hand weapon of wood.*" But in none of theſe caſes is there the leaſt mention of *malice*; which was, therefore, moſt certainly *implied:* and the *congregation* (to which our trials *per Pares* are in ſome degree ſimilar) were to judge

" thereof our elders (the Saxons) called Morð and " Morðor, as we now found it. Afterward (about the " time of M. Bracton) murder was reſtrained to *a ſe-* " *cret killing only:* and therefore he, in the definition " of murder ſaieth, that it is *occulta occiſio*, &c. with " whom Britton agreeth alſo. But ſince the ſtatute " (14 Edw. III. c. 4. by which the preſentment of " *Engleſherie* was taken away) *Murder* is taken in a " middle degree, neither ſo largely as it firſt was, nor " ſo narrowly as it afterward became to be. For *Mur-* " *der* is now conſtrued to be, where one man of *malice* " *prepenſed* killeth another felonioufly, that liveth with- " in the realme under the protection of the queene, " whether it be openly or privilie, and whether the " partie ſlayne be Engliſh or alien." And then he proceeds to ſhew that the " *malice prepenſed*" may be either *apparent*, or *implied*.

" *according*

" *according to theſe judgments;*" ſee 24th verſe. For the ſlayer was not *to die, until he ſtood before the congregation in judgment*; ſee 12th verſe: and then, if it did not appear, that the killing was at *unawares* (בשגגה in error) ſee 11th verſe, or, as the ſame meaning is expreſſed in different words in Deut. xix. 4. בבלי דעת *ignorantly*, or *without knowledge* (agreeable to the example, there laid down, for all other caſes of mere *misfortune*[1]) the malice was preſumed from

[1] " As when a *man* goeth into the wood with his " neighbour, to hew wood, and his hand fetcheth a " ſtroke with the ax to cut down the tree, and the head " ſlippeth from the helve, and lighteth upon his neigh- " bour, that he die," &c. (Deut. xix. 5.) or as it may, rather, be rendered, the " iron glanceth from the " tree, ומצא *and findeth* his neighbour, that he die;" which correſponds, in ſome meaſure, with that leſs explicit caſe mentioned in Exodus xxi. 13. where God is ſaid to *deliver him into his hand*, or rather, to make him *meet his hand*, as Mr. Haak tranſlated it in 1657; as if a man ſhould accidentally come in the way

from the *weapon* with which the ſtroke was made; for *the hatred* משנא *and en-*

of a ſtroke that was aimed at ſome other object: for "as God is the Lord of life and death, whoſe Provi- "dence is over all his works, the ſcripture teaches us to "aſcribe to him all ſuch events, as in common phraſe, "are called *accidental*." (Dr. Dodd) and ſo Caſtalio tranſlates the paſſage. "*In eum fortefortuna incur-* "*rerit*;" which he further explains in a note as follows: "In Hebræo eſt, *Deus ejus manui injecerit.* "Sed Deus pro *fortuna* Hebraicè ideo dicitur, quod "quæ putant homines *caſu fieri*, utpote quæ non præ- "viderint, ea *Dei* providentiâ fiunt, cui nihil fortuitum "eſſe poteſt. &c." The learned Selden (who was moſt deſervedly eſteemed for his knowledge in the laws both of God and men) ſuppoſed alſo that the text in Exodus xxi. 13. might relate to *involuntary homicide*; and he accordingly refers to it from his firſt diviſion of that head, "Prima eſt quando בשגגה *ex errore* & *igno-* "*rantiâ* ſimplici atque infortunio, nec tamen ſine culpâ "levi ex negligentiâ aliquâ, qualem prudentiores ſeu "cordatiores fugerent, contractâ, omnino interea *nolens* "*quis* hominem occiderat; juxta illud in lege ſacrâ "(Exod. xxi. 13.) Qui non eſt inſidiatus, ſed *Deus* "*tradidit illum in manum ejus*, ponam tibi locum quo "confugiat." (1 Tom. Tract. de Jure Naturali & Gentium, cap. ii. *de homicidio involuntario*, ſeu quod caſu factum ac errore, &c.)

mity

mity איבה were never enquired after in any caſes where a *wilful* ſtroke was given with "*an inſtrument of iron*," or "*a weapon of wood*," or even with "*a ſtone (wherewith a man may die)*" that is, if it were ſuch a ſtone as was apparently capable of occaſioning the death of a man (ſee Numb. xxxv. 16. to 19.) all which crimes were unpardonable by the law of God; "*he ſhall ſurely die.*"

And the Levitical Law is, certainly, in this point, *ſtill binding*, even under the diſpenſation of the goſpel; becauſe the reaſon and juſtice of it ſtill ſubſiſts, as in other *moral laws*.

So that the allowance uſually made for *ſudden anger*, when the blow is *given with a weapon*, is ſo far from deſerving the name of "*a proper diſtinction in the crime of killing*," (as ſome contend) that

it is apparently founded in *a want* of that *proper diſtinction*, which the laws of God and reaſon require, concerning caſes of m*anſlaughter*, wherein *ſudden anger* is really excuſable; which can only be when *the killing* is not *voluntary*, or, at leaſt, *the intention of killing* not apparent; as in the caſes before-mentioned of a man ſtriking another merely *with his hand*,[m] or fiſt, in *ſudden anger*; or the ſudden *thruſting*[n] a man down, by

[m] See a caſe ſuppoſed by Judge Holt in his edition of Kelyng's Reports, 131. Regina verſus Mawgridge. "Suppoſe (ſays he) upon provoking language given by "B. to A. A. gives B. a box on the ear, or a little "blow with a ſtick, which happens to be ſo unlucky "that it kills B. who might have ſome impoſthume "in his head, or other ailment, which proves the cauſe "of his death; this blow, though not juſtifiable by "law, but is a wrong, yet it may be but *manſlaughter*, "becauſe it doth not appear that he *deſigned* ſuch a "miſchief."

[n] See the caſe of Thompſon and Daws, cited by Lord Chief Juſtice Holt, in the caſe *Rex verſus Plumer*,

by which he is hurt in falling, ſo that death unexpectedly enſues. In theſe and ſimilar caſes *the malice* or the *intention of killing* is not neceſſarily *implied* in the action itſelf; and, therefore, if all the other circumſtances are alſo free from premeditated *malice* and laying in wait, the law has reſerved a *reaſonable* uſe of an *unreaſonable* popiſh indulgence, called The Benefit of Clergy, to relieve the *undeſigning manſlayer* (if the occaſion

mer, (Kelyng, p. 115.) "Thompſon *thruſt* away "Daws, and threw him down upon an iron in the "chimney, which broke one of his ribs, of which he "died; this, upon a ſpecial verdict, was held to be "*only manſlaughter*, though the peace was broke, and "the perſon ſlain came only to keep the peace; and "it is the ſame if he had been conſtable," that is, if he did not declare his intention, (as it is afterwards explained) and charge the offending parties, in the king's name to keep the peace. This caſe is properly *excuſeable manſlaughter*, becauſe it did not appear that the *killing* was *voluntary*, though the "*thruſting* away" was *voluntary*; and therefore the *malice*, or intention, was neither *expreſs* nor *implied*, as in *murder*.

was

was not *unlawful)* from the too great ſeverity of the common law; for in ſuch caſes we may ſafely admit Sir Edward Coke's maxim, "Delinquens per "iram provocatus puniri debet mitius," 3 Inſt. 55.[a]

But a falſe idea of mercy, and conſideration for *ſudden anger* unhappily prevailing in the Courts, this lenity was *indiſcriminately* extended even to caſes where the *prepenſed malice* was neceſſarily *implied* by the ſtroke; ſo that the wretch, who ſtabbed his neighbour in *brutal anger*, eſcaped with impunity, to the ſcandal of public juſtice. The bad effects of this *falſe mercy*, and injuſtice, became ſo notorious in the reign of King James I. that the legiſlature was obliged to ſeek a remedy; and a ſtatute was then made (1 Jac. I. c. 8.) by which the

[a] "He who, provoked by anger, offends, ought to be more mildly puniſhed."

benefit

benefit of clergy was taken away from "the offence of *mortally ſtabbing* another, though *done upon ſudden provocation.*" Judge Blackſtone's Com. b. 4. c. xiv. p. 193. But unfortunately this remedy proved almoſt as *indiſcriminate* as the abuſe intended to be corrected by it; for it takes no notice of any other crime than that of *ſtabbing*; as if *ſudden anger* was not *equally criminal*, when a man is killed "*by throwing a hammer or other weapon*;" or by "*a ſhot with a piſtol.*" Ibid. p. 194. Whereas, in truth, no new law was wanted: nothing but a better adminiſtration of the old laws before-mentioned; for, in all ſuch furious ſallies of *ſudden anger*, the *malice* was neceſſarily *implied*, or *preſumed, from the weapon*, as well in the laws of God (which I have already ſhewn) as in the law of nations: —"*Ex telo præſumitur malum conſilium* (ſays the learned Grotius) "*niſi contrarium*

" *rium appareat.*" [p] And in his ſecond book, de Jure Belli & Pacis, he remarks, " that either *iron, a club, or a ſtone,* comes under the denomination of a weapon. " *Teli* autem nomine *ferrum,* " *fuſtis,* & *lapis* venit," c. i. p. 175.

The reaſon of the ſeverity in the divine law, againſt ſtriking *with a weapon,* is well expreſſed by Dr. Wells in his paraphraſe on Numbers xxxv. 16 to 19. " Foraſmuch (ſays he) as though he " might have no malice to him before-" hand, yet his ſtriking him *with a* " *ſword,* or *hatchet,* &c. ſhews he had " *an intention* to do him miſchief; and, as another writer remarks " though per-" haps he had no *formed intention to kill* " the perſon; yet he ought to have mo-" derated his paſſion, and could not be

[p] " From the weapon the evil intention is preſumed, " unleſs the contrary ſhould appear."

" ignorant that *ſuch an inſtrument* was " capable of inflicting *a deadly wound*,"

And, therefore, when a man is *killed with a weapon* (except it be by *misfortune*, or in *ſelf-defence* [q], when the Slayer could retire no further to ſave himſelf without ſtriking; or elſe in ſuch lawful and reaſonable caſes, wherein a man is not obliged to give back; as in the caſe of a peace officer [r], who is aſſaulted in

[q] " Regularly, it is neceſſary that, the perſon, that " kills another *in his own defence*, fly as far as he may " to avoid the violence of the aſſault before he turn " upon his aſſailant; for though in caſes of hoſtility " between two nations it is a reproach and piece of " cowardice to fly from an enemy, yet in caſes of aſ- " faults and affrays between ſubjects under the ſame " law, *the law owns not any ſuch point of honour*, be- " cauſe the king and his laws are to be *vindices injuriarum*, and private perſons are not truſted to take " capital revenge one of another." 1 Hale, p. 481.

[r] " If a gaoler be aſſaulted by his priſoner, or if the " Sheriff or his Miniſter be aſſaulted in the execution

in his duty; or when any other man endeavours to keep the peace[s], or to save another person from violence and oppression[t]; or

" of his office, *he is not bound to give back to the wall,* " but if he kill the assailant, it is in law adjudged *se* " *defendendo*, though he *gave not back to the wall.* " The like of a constable or watchman," &c. 1 Hale, p. 481. For which he quotes Co. P. C. p. 56. 9 Co. Rep. 66. b. Machally's case.

[s] " Ou il purra dire que il le tua en defendaunt " *nostre pees*, &c." Britton, p. 44. b.

[t] " For it is the duty of *every man* to interpose in " such cases, for preserving the public peace, and pre- " venting mischief." Foster, p. 272. for which he refers to Stanf. 13. & 2 Inst. 52. And in the latter place there are several cases mentioned wherein *a private person* may lawfully interfere *by warrant in law without writ.*——Lord Hale also allows, that " *every* " *man* is bound to use all possible lawful means to " prevent a felony, as well as to take the felon, and " if he doth not, he is liable to a fine and imprison- " ment, therefore if B. and C. be at strife, A. a by- " stander, is to use all lawful means that he may, " without hazard of himself, to part them, &c.—— " If A. be travelling, and B. comes to rob him, if C. " falls into the company, he may kill B. in defence of " A.

or a woman [u] in the neceſſary defence of chaſtity; or when any perſon reſiſts the

" A. and therefore much more, if he come to kill him, " and ſuch his intent be apparent; for in ſuch caſe of " a felony attempted, as well as of a felony committed, " *every man is thus far an officer*, that, at leaſt, his kill- " ing of the attempter *in caſe of neceſſity*, puts him in " the condition of *ſe defendendo* in defending his neigh- " bour." 1 Hale, p. 484 & 485. " Ou il purra dire " que tout fiſt il le fait, nequedent ne le fiſt il mye par " felonie purpenſe, mes par neceſſite ſoy defendaunt, " *ou ſa femme, ou ſa meaſon, ou ſa meyne, ou ſon ſeig-* " *niour, ou ſa dame de la mort*, &c." Britton, p. 44. b.——And again, " ei qui juſtè poſſidet, licitum " erit cum armis contra pacem venientem ut expellat, " *cum armis* repellere, ut per arma tuitionis et pacis, " quæ ſunt juſtitiæ, repellat injuriam, et vim injuſtam, " et arma injuriæ: ſed tamen cum talis diſcretionis " moderamine, quod injuriam non committat, non " enim poterit ſub tali pretextu hominem interficere, " vulnerare, vel male tractare, *ſi alio modo ſuam tueri* " *poſſit poſſeſſionem*. Ei igitur qui vult viribus uti, erit " viribus viriliter reſiſtendum cum armis vel ſine, juxta " illud. *Cum fortis armatus, &c.*" Bract. l. 4. c. 4. 162. b.

[u] " A woman in defence of her chaſtity may law- " fully kill a perſon attempting to commit a rape upon " her. The injury intended can never be repaired or " forgotten," &c. Foſter 274

attack of a Robber [w]). I ſay, excepting theſe, and ſimilar caſes, if a man *wilfully*

[w] Thorp dit que *cheſcun home peut prender larons*, et s'ils ne voilent ſoi render, mes eſtoient al defens ou fuont; in tiel cas *il les peut occire ſans blame.* Staundford, p. 13, Alſo, "If a thief aſſault a true man, "either abroad or in his houſe, to rob or kill him, "*the true man is not bound to give back*, but *may kill* "the aſſailant, and it is not felony." 1 Hale, p. 481. for which he quotes Co. P. C. p. 56.——But this rule is ſubject to juſt reſtrictions; for *even a thief* is not to be *killed* but through *neceſſity*, "Si alio modo ſuam tueri poſſit poſſeſſionem, &c. See the preceding quotation from Bracton.—Judge Hale, indeed, ſeems to think that a thief may lawfully be killed, if he cannot otherwiſe be taken. "If a perſon (ſays he) be in- "dicted of felony, and flies, or being arreſted by war- "rant or proceſs of law upon ſuch indictment, eſcapes "and flies, and will not render himſelf, whereupon "the officer or miniſter *cannot take him without killing* "*of him*, this is not felony," &c.

"But if he *may be taken without ſuch ſeverity*, it "is *at leaſt manſlaughter* in him that kills him: there- "fore the jury is to enquire whether it *were done of* "*neceſſity or not.*" 1 Hale 489. for which he cites 3 E. 3. Coron 288. 22 Aſſiz. 55. Stamf. P. C. lib. 1. cap. 5. fol. 13, b. But this doctrine requires ſome further

" the *weapon*, rendered *expreſs*, as I have before obſerved, though the " *prepenſed* " *malice*" may, perhaps, more properly (upon a *ſudden provocation*) be ſaid to be *implied*; and it, certainly, is *implied* or *preſumed* in law, though the *ſudden anger* was but a moment before the fatal ſtroke [x]; ſo that, if no proof can be produced

" even to that offence. The blood was heated in the " purſuit, his prey, *a lawful prey*, juſt within his reach, " and no ſignal miſchief *was intended*. But had he " made uſe of a *Deadly Weapon*," (here is the proper diſtinction for which I contend) " it would have " amounted to *Murder*. The miſchievous vindictive " ſpirit, the *Malitia*, I have already explained, which " always muſt be collected from circumſtances, deter- " mineth the nature of the offence."

[x] I would willingly *except* from this rule (If I may be allowed to do ſo) that *ſudden anger*, which of all others, is moſt deſerving of indulgence and privilege, as being incited by the moſt atrocious *injury* and *affront*, that one man can poſſibly receive from another; ſo far doth it ſurpaſs *in villainy* every other act of *injuſtice* and *diſhoneſty*; I mean " the *caſe of a huſband taking the* " *Adulterer in the manner:*" to this caſe alone (as Lord Bacon

produced by the priſoner, of *an inevitable neceſſity*, as in *ſe defendendo*, the act muſt, in reaſon and juſtice, be deemed "*wilful murder of malice prepenſed*," ſuch as was ſufficiently excluded from the benefit of clergy by two expreſs acts of parliament (23 Hen. VIII. c. 1. and 1 Edw. VI. c. xii.) previous to the undiſtinguiſhing act of James I. againſt ſtabbing.

By an act of the 2 Edw. III. it was ordained that a charter of pardon "ſhall "not be granted, but only where *the*

Bacon informs us) the ancient Roman law reſtrained "*the privilege of paſſion to that rage and provocation* "*only*," (ſays he) "it gave way, *that it was an homi-* "*cide* (which) was juſtifiable. *But for a difference to be* "*made*" (adds the learned Chancellor) "*in caſe of kill-* "*ing and deſtroying man upon a fore thought purpoſe*" (as in the caſe of duelling) "*between foul and fair*, and as "it were *between ſingle murder and vyed murder; it is* "*but a monſtrous child of this latter age, and there is* "*no ſhadow of it in any law, Divine or Human!*"

" *king may do it by his oath*[y]; that is to " ſay, where a man ſlayeth another in

[y] This Statute was confirmed and enforced by two ſubſequent ſtatutes of the ſame reign (10 Ed. 3. c. 2. and 14 Ed. 3. c. 15.) in the plaineſt terms that words are capable of expreſſing; yet were they not ſufficient to root up the *diſloyal* practice of *pardoning murderers*: for in the following reign, King Richard the II. (as if in preparation to his own deſtruction) paid ſo little regard to theſe juſt and neceſſary laws, that in the parliament of his 13th year, *the Commons* made " *grievous* " *complaint*" (ſee 13 R. 2. St. 2.) " of the outrage- " ous miſchiefs and damages which have happened " to his ſaid realm, for that Treaſons, *Murders*, and " *Rapes of Women* be commonly done and committed, " and *the more becauſe charters of pardon have been eaſily* " *granted* in ſuch caſes;" and " *the ſaid Commons re-* " *queſted our Lord the King, that ſuch charters might* " *not be granted.*" The three former Statutes were *then*, as they ſtill are, unrepealed, and no ſubſequent Statute had at that time been made, that could poſſibly be conſtrued to affect them, or abate their force, ſo that the King's *diſloyalty* in granting ſuch *prohibited charters* was notorious; and his anſwer to the Commons was not leſs *diſloyal* than his practice, viz. " *That he will ſave his liberty and regality as his pro-* " *genitors have done heretofore.* Richard, however, conſented

" in his *own defence*, or by *misfortune*". Now with reſpect to the firſt caſe, viz. " *in*

conſented to admit ſome conſiderable limitation of his *pretended prerogative* in pardoning *murder*. See 2 ſtat. c. 1. whereby it is ordained, " *that no charter of par-* " *don from henceforth ſhall be allowed* FOR MURDER, " *or for the death of a man ſlain by await, aſſault, or* " *malice prepenſed, Treaſon or Rape of a Woman, un-* " *leſs the ſame murder*, &c. *be ſpecified in the ſame* " *charter.*" On a ſlight view, the word " UNLESS" may ſeem, by a negative implication, to admit the *allowance* of a *charter of pardon for murder;* but Sir Edward Coke has remarked upon it, that " *the inten-* " *tion of the ſaid act of* 13 *R.* 2. *was* NOT *that the King* " *ſhould grant a pardon for murder, by expreſs name in* " *the charter; but becauſe the whole Parliament con-* " *ceived, that he would never pardon Murder by ſpecial* " *name for the cauſes aforeſaid, therefore was that pro-* " *viſion made, which was grounded*" (ſays he) " *upon* " *the Law of God, Quicunque effuderit humanum ſan-* " *guinem, fundetur ſanguis illius; ad imaginem quippe* " *Dei creatus eſt Homo.* NEC ALITER EXPIARI " POTEST NISI PER EJUS SANGUINEM *qui alterius* " *ſanguinem effuderit.*" (Gen. 9. 6. Num. 35. 33.) So that this learned Lawyer really reſolves " THE " INTENTION OF THE SAID ACT" into the doctrine of the *Divine Law*, for which I contend, viz.

 " *that*

" *in his own defence,*" (or *ſe defendendo*) " all writers, both antient and modern, agree,

" *that blood*" (i. e. wilful murder) " *cannot be expiated* " *but by the blood of the guilty.*" And happily the Act ſeems alſo to have been *effectual* to accompliſh that *intention*; for the learned Judge Blackſtone, after citing Sir Edward Coke's opinion, that it was " NOT " THE INTENTION *of the Parliament, that the King* " *ſhould ever* PARDON MURDER *under theſe aggrava-* " *tions,*" &c. adds, " *and it is remarkable enough*" (ſays he) " *that there is* NO PRECEDENT OF A PAR- " DON *in the regiſter for any homicide than that* which " happens SE DEFENDENDO, or PER INFORTUNIUM." And with reſpect to the determination of the Court of K. B. cited by Salkeld 499, that *the King may pardon on an indictment of murder*, as well as the ſubject may diſcharge an appeal; I obſerve, that the force of the learned Judge Holt's argument for that doctrine, reſts on the repeal (in 16 R. 2. c. 6.) of the reſtrictions, and great difficulties which are put upon thoſe that ſhall be ſuitors for *a pardon of murder* in this Act of 13 R. 2. which (ſaid he) " *were found* GRIEVOUS TO THE " SUBJECT:" But that worthy and upright Judge would have acted on this point more like himſelf, if he had previouſly examined the nature of the ſuppoſed *grievance*, whereby he would have known, whether it was really *true* and *juſt*, or only *fained?* For if the alledged

" *grievance*

agree, that the killing of a man muſt

" *grievance to the ſubject*" was only an *unjuſt ſuggeſtion*, the whole Statute of *Repeal*, as far as relates to this point is *null* and *void* for the *want of truth*, as well as for being contrary to the 2d foundation of Engliſh law, " for *contra veritatem nihil poſſumus:*" and again " *contra veritatem lex nunquam aliquid permittit*". (2 Inſt. 252 Plowden, &c.) But above all, the FATAL END of King Richard II. ſhould warn and deter all future Monarchs from preſuming to aſſert a PREROGATIVE TO PARDON MURDER. The ill-fated Monarch by his ignorance of the nature of *Royal Prerogative* in a *limited* or *politic government*, prepared the way for his own deſtruction, not conſidering that his *regality* had no foundation but the *law*; and that his neglect of the latter, did neceſſarily undermine the former, which he afterwards ſeverely experienced when compelled to deliver up both Crown and *Regality* with a public confeſſion of his own unworthineſs to bear them: And it is remarkable, that the *murders* which had increaſed through his criminal indulgence, were awefully retaliated afterwards in his own *blood*: for, at laſt, he was himſelf, alſo, moſt cruelly and wickedly *murdered*, contrary to the laws of God and man, as if the *blood* which he had unjuſtly refuſed to *cleanſe from the land*, and *expiate by the blood of the guilty*, had fatally reſted on his own head!!!

be[z] *inevitable*, and that the manſlayer muſt be able to prove, that he retired; and that he was obliged, *ex neceſſitate*, to ſtrike, in order to ſave his own life; a plea which cannot be admitted in favour of a Man, who has accepted a challenge; or who has drawn his ſword, in *ſudden anger*, merely to revenge an affront.

[z] "It muſt be *inevitable neceſſity*." (Pleas of the Crown, 1678, p. 33.) "upon *an inevitable cauſe*." 3d Inſt. chap. 8. p. 55 and 56.——"but care muſt "be taken that the reſiſtance does not exceed the bounds "of *mere defence* and *prevention*; for then the defender "would himſelf become an aggreſſor." 3 Blackſtone 4—"this is not excuſeable *ſe defendendo*, ſince there is no *abſolute neceſſity*,"—&c. 4 Blackſtone 191. "Eins "tout la matier conſiſt *in le inevitable neceſſite*, ſans "quel *le tuer n'eſt Aſcun Voi Excuſable*." Staunford, P. C. lib. 1. c. 7.——"He muſt flie ſo farre as he "may, and till he be letted by ſome wall, hedge, &c. "——that his *neceſſitie* of defence may be eſteemed alto-"gether *great and inevitable*," &c. Lambard's Eiren. c. 7. p. 256. See note in p. 41.

And

And with reſpect to the ſecond *pardonable caſe*, mentioned in the ſaid act of Edw. III. viz. *by Misfortune*, I muſt obſerve, that there are ſome caſes of homicide that may even be ſaid to happen *by misfortune*, or *without intention*, which are, nevertheleſs, deemed *Murder*. And the ſeverity of the law, in this reſpect, will enable me, by compariſon, to point out, more clearly, the abſurdity and injuſtice of excuſing homicide, in conſideration *of ſudden anger*, when the mortal ſtroke is given *with a weapon* in rencounters.

The caſes of *Misfortune or Accident*, which are deemed *Murder*, are thoſe wherein the act, which undeſignedly occaſions death, is in itſelf *unlawful*[aa].

" If

[aa] " For if the act be *unlawful*, I mean, if it be Ma-
" lum in ſe, the caſe will amount to felony, either *murder*
" or *manſlaughter*, as circumſtances may vary the na-
" ture

" If the act be *unlawful* (says Lord Coke) " it is *murder*. As if A. meaning to " steal a deer in the park of B. shooteth " at the deer, and by the glance of the " arrow killeth a boy that is hidden in " a bush; *this is murder*, for that the " act was *unlawful*, although A. *had no* " *intent* to hurt the boy, *nor knew not* " of him." 3 Inst. 56. Lord Chief Justice Holt, indeed, says it is but *manslaughter*; in which he is mistaken [bb], (See his Edition of Kelyng. Rex versus Plummer, 117.) But whether this be deemed *murder* or *manslaughter*, the *killing* is merely accidental, or by *misfortune*; and, therefore, is certainly a much less crime than that of aiming at,

" ture of it. If it be done in prosecution of *a felonious* " *intention*, it will be *Murder*; but if the intent went no " further than to commit *a bare trespass*, *manslaughter*." Judge Foster, p. 258. " Though I confess (says he) " Lord Coke seemeth to think otherwise."

[bb] See note in ps. 23, 24 and 25, and Judge Holt's own opinion on another case quoted in p. 56.

and ſtriking a man *with a weapon*, or ſhooting at him in *ſudden anger*, howſoever great the previous affront may have been. For, in the former caſe, though the *ſhooting* at a *deer* belonging to another perſon is both *unlawful*, and *voluntary*, yet the *manſlaughter*, which it accidentally occaſions, is *involuntary*, and without intention; whereas in the *voluntary* aiming, and ſhooting at a man, the act itſelf is not only *unlawful*, but *implies malice*; or rather, I may ſay, the *malice* is *expreſſed* by the act; and the *ſudden anger* is ſo far from being an *excuſe*, that it is, abſolutely, a further proof of the *malice* and *intention* of *killing*. The *malice* was alſo *implied* in the caſe of the Lord Dacres, though his Lordſhip was not half ſo criminal in *his unlawful hunting*, as the paſſionate man who ſtrikes *with a weapon*. See how the caſe is mentioned by Lord Chief Juſtice Kelyng, (Rep. p. 87. publiſhed by Judge Holt.)

The

" The Lord Dacres and Manſell, and " others in his company came *unlawfully* " to hunt in a *foreſt* [cc], and being reſiſted, " one of the company, when the Lord " Dacres was a great way off, *and not* " *preſent*, killed a man; judged *murder* " in him *and all* the reſt, and the Lord " Dacres *was hanged*."

Lord Chief Juſtice Holt ſuppoſes a caſe in his Rep. of Rex verſus Plummer, p. 117. in the ſame book, which is in ſome degree ſimilar. " So (ſays he) if

[cc] Judge Kelynge was miſtaken in this point: for the Lord Dacres probably would not have been treated with ſuch ſeverity, if *the Treſpaſs* had been in a *Foreſt* or open chace; but it was in a *Park* belonging to Mr. Pelham in Surry (Crompton 25.) ſo that the *unlawful* Hunting was more than *a bare treſpaſs*. See note, p 23, 24, and 25. See alſo 1 Hawkins, cap. xxxi. § 46. where another ground for the imputation of *Murder*, in that caſe, ſeems to be aſſigned, viz. a Reſolution of Divers Perſons to reſiſt all oppoſers in the commiſſion of *a breach of the peace*; though it be only, as he calls it, *a bare breach* of the peace.

" two

" two men have a deſign to ſteal a hen, " and the one ſhoots *at the hen* for that " purpoſe, and *a man be killed*, it is " *murder* in both, becauſe the *deſign* " *was felonious.*" See alſo the laſt paragraph of p. 56. 3 Inſt. concerning the ſhooting at a *tame fowl*, of which this caſe, ſuppoſed by Judge Holt, is an explanation. But ſurely *the deſign* muſt be much more *felonious* when a man *wilfully* ſtrikes his neighbour *with a weapon in ſudden anger*; becauſe this muſt neceſſarily be allowed to be an act " com- " mitted *felleo animo*, with a *fell*, *furi-* " *ous*, and miſchievous *mind* and *intent*," which is Lambard's definition of *felony*, c. vii. p. 224.

The *implication of malice* in the owner of a beaſt that kills a man, after warning given, will alſo further illuſtrate what has been ſaid; for though mere careleſſneſs or inconſideration might oc-

caſion his neglect, ſo that the accident may, in ſome degree, be eſteemed a *misfortune*, yet the law implies *malice*; "for if one keep a maſtiff dog (ſays Sir "James Aſtry, in his charge to grand "juries, p. 18.) that is uſed to bite peo- "ple near the common highway; or bull "or beaſt, that hath hurt any one (after "notice) they kill any one, *that will be* "*murder in the Owner*, although not "preſent when the fact was done; and "yet in this, and the other precedent "caſes, here is no *expreſs malice to be* "*proved*, but what the law conſtrues to "be ſo:" this is agreeable to the doc- trine of Judge Staunford, P. C. lib. i. cap. 9. "Que ſi home ad un jument "que eſt accuſtomé male faire et le "Owner ceo bien ſachant, negliga luy, "eins ſuffra d'aller a large, et puis le "jument tua un home: que ceo *eſt felo-* "*nie* in le owner, eo que, per tiel ſuf- "ferance: *le owner ſemble d'aver volunté*

" *a tuer.*" See alſo Crompton, p. 24. b. and 1 Hawkins, c. xxxi. § 8. And, according to Bracton, the Common Law *imputes* the death of a man by a beaſt, to any man, who follows, or drives the beaſt at the time of the misfortune;— " vel dum inſequitur quis equum *vel* " *bovem*, et aliquis *a bove* vel *equo* per- " cuſſus fuerit, et hujuſmodi *hoc imputa-* " *tur ei.*" Bract. lib iii. c. iv. p. 120. b. If this law were ſtill enforced, we ſhould not have ſuch continual complaints of accidents in the ſtreets, by cattle, that are enraged, and made mad, through the cruelty of the two-legged brutes who drive them. For the firſt ſtep that ought to be taken, in ſuch caſes, is, to ſeize *the drivers*; and, nineteen times out of twenty, it will be found, that the poor beaſt will recover it-ſelf (when they are gone) from the exceſs of fear and rage which the Brutality of the *hurrying*

Drivers[dd] had occaſioned; ſo that it is plain where the guilt is to be *imputed:* but yet even *a brutal driver* is not ſo baſe and deteſtable as the man who wilfully ſtrikes *with a weapon* in ſudden anger. And again, he who aims to ſtrike or ſhoot *at a man*, and accidentally kills a *different perſon* (whom perhaps he did not ſee) contrary to his intention (or *by misfortune* as it were) is, nevertheleſs, deemed guilty of *wilful murder*, though he had not the leaſt *anger*, or reſentment, againſt the *perſon killed*[ee]. But ſurely the man

[dd]—— "Si quis operam rei dederit illicitæ, ut cum "quis *Boves velociter fugaverit*, quorum unus obviando "hominem cornu occiderit, *fugatori imputabitur*, quia "diligentiam quam potuit non adhibuit." Fleta, lib. i. c. xxiii. p. 34.

[ee] Homme ſagitta a un *ex malicia præcogitata*, et luy miſſe, et tue autre qui eſtoit decoſt, et a qui nad malice, unc' il eſt *murder*, eo que il *ad intent* de *murder*. Crompton's edition of Fitzherbert's Juſtice of Peace, p. 23.——"As if a man, ſays Judge Holt, "out of malice to A. ſhoots at him to kill him, but "miſſes

man who *actually kills* the perſon *he aims at, in his anger*, is at leaſt as culpable! ſo that if *ſudden anger* deſerves no lenity in the former caſe, it certainly deſerves none in the latter. Several caſes alſo are mentioned by Sir William Blackſtone, wherein *ſudden anger* is not excuſable, even though the death may be ſaid to be "*by misfortune*," as there was no real *intention of killing, yet rendered by the circumſtances* "*equivalent to a deliberate* "*act of ſlaughter*." See Comment. b. iv. chap. xiv. p. 199 and 200. "Alſo "if *even upon a ſudden provocation* (ſays "he) one beats another in a cruel and "unuſual manner, ſo that he dies, *though* "*he did not intend his death*, yet he is "guilty of *murder* by an *expreſs malice*;

"miſſes him and kills B. it is *no leſs* a *murder* than if "he had killed the perſon intended," Lord Chief-Juſtice Holt's Rep. of Rex verſus Plummer, in Kelyng's Rep. p. 111. for which he quotes Dyer, p. 128. Cromp. p. 101. Plowden's Com. p. 474. Saunders's caſe, 9 Rep. 91. Agnes Gore's caſe.

"*that*

" *that is, by an* expreſs *evil deſign*, the " genuine ſenſe of *malitia*. As when " a park-keeper tied a boy that was ſteal- " ing wood, to a horſe's tail, and drag- " ged him along the park; when a " maſter corrected his ſervant with an " *iron bar*, and a ſchoolmaſter ſtamped " on his ſcholar's belly; ſo that each of " the ſufferers died; theſe were *juſtly* " *held to be murders*, becauſe the cor- " rection being exceſſive, and ſuch as " could not proceed but from a bad " heart, it *was equivalent to a deliberate* " *act of ſlaughter*." But is not *an expreſs evil deſign* as apparent, in the act of ſtri- king a man with *a weapon*, *in anger*, (be the *anger* ever ſo ſudden) as it is in theſe caſes where death was *not really intended*? For ſurely the *deſign of killing*, is by the weapon rendered expreſs [ff]; which equally fulfils

[ff] " If one executes his revenge upon *a ſudden provo-* " *cation* in ſuch a cruel manner, with a *dangerous wea-* " *pon*

fulfils "*the genuine ſenſe of malitia,*" tho' perhaps, the *prepenſed malice* may, more properly (*upon a ſudden provocation* as above) be ſaid to be *implied* than *expreſs*. But whether it be *expreſs* or *implied*, it undoubtedly conſtitutes *murder*; for *malice* is the leading circumſtance which diſtinguiſhes *manſlaughter* from *murder*, and therefore *an expreſs evil deſign*, ſuch as is apparent in the *voluntary killing* of a man, cannot be admitted under the head of *ſimple homicide* or *manſlaughter*, becauſe the neceſſary difference is wanting *in the degree of the offence* according to the excellent rule before cited from

"*pon* as ſhews a malicious and deliberate intent to do "miſchief, and death enſues, it is *expreſs malice* from "the nature of the fact, and murder." Wood's Inſt. 3 Book, p. 608. And this muſt always be the caſe when men preſume to decide their quarrels *with dangerous weapons*, be quarrels *ever ſo ſudden and unpremeditated:* for the "*malice*" is by the weapons, *expreſſed*, and the "*malice prepenſed*" is therefore *implied*. "Ex telo præſumitur malum conſilium," &c. See p. 39.

Sir

Sir Matthew Hale, viz.——" murder " being aggravated with *malice presumed* " *or implied*; but manslaughter *not*," " &c. 1 Hale, P. C. 466.

I may probably seem guilty of much tautology in this little Work; but hope my Readers will excuse it, in consideration of the necessity I am under, of repeatedly comparing the crimes of *striking with a weapon* in *sudden Anger*, and of *voluntary Killing*, with so many other different cases, wherein even *involuntary* and *accidental* Killing have been solemnly adjudged *Murder:* and I apprehend that *the severity* of the Law, in the last-mentioned cases, must sufficiently demonstrate such *a general abhorrence in our Law* to the shedding of *Human Blood*, that we cannot reasonably suppose *the same Law* capable of admitting an excuse for *voluntary Manslaughter* on an

any private difference, howſoever great the provocation. Nevertheleſs, Mr. Hawkins ventures to aſſert a very different doctrine in his Pleas of the Crown, 1 Book c. xxviii. § 24. "I ſee no "reaſon (ſays he) why a perſon, who "without provocation is aſſaulted by "another in any place whatſoever, in "ſuch a manner as plainly ſhews an in-"tent to murder him, as by diſcharg-"ing a Piſtol, or puſhing at him with a "drawn Sword, &c. may not *juſtify* "*Killing* ſuch an Aſſailant, as much as "if he had attempted to rob him: for "is not he, who attempts to Murder me "(ſays he) more injurious than he who "barely attempts to rob me? And can "it be more juſtifiable to fight for my "goods than for my life? And it is "not only highly agreeable to reaſon, "that a man in ſuch circumſtances may "*lawfully Kill* another, but it ſeems

" alſo to be confirmed by *the general Te-*
" *nor of our Law-books,*" &c.

But howſoever ſpecious this argument may appear, I hope I have already proved " *by the general Tenor of our Law-books;*" that the *Juſtifiable Killing* of a Man muſt be through *an inevitable neceſſity:* and therefore what Mr. Hawkins afterwards advances, in his compariſon of ſuch a caſe with Homicide in *ſe Defendendo*, cannot in the leaſt juſtify either his opinion on that point, or his aſſertion concerning " *the general* " *Tenor of the Law-books.*"

He endeavours to repreſent *the Voluntary Killing* of a Man as *Juſtifiable Homicide*, and conſequently he muſt ſuppoſe it a leſs crime than *Excuſable Homicide*, in *ſe Defendendo.*

He founds his opinion in the ſuppoſition of " ſome *precedent Quarrel*" in the

the latter, "in which" (ſays he) "both "parties always are, or at leaſt may "*juſtly be ſuppoſed* to have been, in "ſome fault, ſo that the neceſſity, to "which a Man is at length reduced "to kill another, is in ſome meaſure "preſumed to be owing to himſelf:" &c.

But may it not, as "*juſtly be ſuppoſed*" that the perſon, who *Kills* without *ſuch neceſſity*, is alſo "*in ſome fault?*" Is not the *Preſumption of Law* againſt him (as I have elſewhere ſhewn) by the *bloody* FACT, when he cannot prove that *he endeavoured*, at leaſt, to retreat, in order to avoid unneceſſary bloodſhed? And is not FACT a more ſubſtantial ground for a criminal charge, than any idea that a Court can poſſibly form concerning the *Murderous Intentions*, which *the Killer* may attribute to *the perſon Killed?*

The ſingle circumſtance that *the Killer* was under *no neceſſity* of endeavouring to retreat, and avoid the aſſailant, is not only a proof that *his own intentions* (though he might not be the firſt aggreſſor) were nearly as criminal, as thoſe he attributes to the *perſon Killed*, but it alſo affords a ſtrong preſumption, that *the latter* was not very ſtrenuous or ſanguine, either in his attack, or in his ſuppoſed *intention to commit murder*: ſo that the very pretence, by which Mr. Hawkins endeavours to juſtify ſuch a *voluntary Killing*, muſt neceſſarily fall to the ground, whenever *the Killer* is unable to prove, that he endeavoured to avoid the attack [gg]. And tho' the Deceaſed might have had "*a Weapon Drawn*," yet that circumſtance affords no poſitive proof of his *criminal*

[gg] I have already made the neceſſary exceptions concerning Civil Officers in the legal Execution of juſtice, &c.

intention;

intention; for he might have thought himſelf obliged to draw in his own defence, through a reciprocal ſuſpicion of his adverſary's *criminal intentions:* and as he cannot plead his own cauſe, it is reaſonable that the Law ſhould *preſume*, that he really did draw in his own defence, eſpecially as the circumſtance, that *the Killer* was under no neceſſity of endeavouring to avoid him, affords a ſufficient Ground for ſuch *a preſumption:*

And even in caſes where it may be ſuppoſed that the *perſon Killed* might really have had "*an intent to murder*," we ought to remember that the Laws of England do not puniſh men *merely* for their "*criminal intentions*" without ſome fact! and, therefore, it would be highly abſurd to ſuppoſe, that the Law, without ſome apparent neceſſity, would entruſt every individual, indiſcriminately,

with a ſupreme Authority, which it denies *even* to the Higheſt and moſt ſolemn Courts of Juſtice; I mean an Authority to inflict capital puniſhment without a previous Trial *per pares*; and that merely for "*a Criminal Intention*;" which, in many caſes, might as eaſily, (through fear, paſſion, or violent prejudice) be miſtaken, or imaginary, as be real!

And therefore "*an Aſſault upon the "Perſon*" is not (as I have before inſiſted in p. 5. againſt the opinion of Judge Foſter) "a Provocation ſufficient to free "*the Party Killing* from the Guilt of "Murder."

The caſe of Gentlemen in the Army, nevertheleſs, ſeems peculiarly hard upon ſuch unhappy occaſions. The firſt principle of their profeſſion is *Courage*; and the World, in general, is too depraved to diſtinguiſh in what caſes a Man

Man of *true Courage* may retreat *with honour* from the Aſſault of an Enemy; ſo that Military Men are liable to be *unjuſtly* deſpiſed, whenever they act *reaſonably* in caſes either of inſult, or aſſault!

Yet, at the ſame time, it ought to be remembered, that thoſe men who ſubmit to *the Slaviſh Yoke* of other Men's depraved opinions or unreaſonable cuſtoms (in contradiction to that *natural Knowledge* of *Good and Evil*, which they inherit, in common with the reſt of Mankind, from our firſt Parents), cannot *juſtly* be deemed *Men of Honour*; and, conſequently, are unworthy of *Rank* in the honourable Profeſſion of Arms. And though ſuch men may ſupport an outward *appearance* of *Courage* in the eye of the world, by *daring* to violate the Laws of God and Man in *private* Quarrels, yet that very act affords

fords the moſt manifeſt token of the Want of *real* and *ſteady Courage*: for unleſs the ſubmiſſion to that depraved cuſtom can be attributed to *inconſideration, or* to *the want of Knowledge*, it muſt neceſſarily be ſuppoſed, that the *Duelliſt had not ſufficient Courage* to aſſert his *natural Right* of Acting agreeable to the Dictates of his *own reaſon and conſcience*; and was *unable to face the Terrors* of *an* adverſe Fortune *in a good Cauſe*; and therefore, like a wretched *Coward*, he yielded himſelf a priſoner and ſlave to the faſhionable Depravity!

I am far from meaning however to charge all Soldiers with Cowardice that have fought Duels: ſometimes Paſſion and falſe Pride, but more frequently inconſideration, and ignorance of the Laws of God and Man (as I have before hinted) occaſion the baſe ſubmiſſion and conformity to thoſe *falſe* and *unreaſonable*

ble notions of Honour, which almoſt univerſally prevail.

Nor do I ſo much blame *the Military Gentlemen*, for this unnatural depravity, as I do *the Profeſſors of the Law*; who ought to have ſet them a better example, and yet, have rather contributed to *the ignorance of the times*, by the many *groſs perverſions* of *our Law*, which they have admitted into the Books. Gentlemen of the Army are not obliged, indeed, to acquire a critical knowledge of the Law, but they muſt not forget that they are *Men*, as well as *Soldiers*; and that if they do not maintain the Natural Privilege of *Men*, (viz. that of thinking for themſelves, and acting agreeable to the Dictates of their *own Conſcience*, as Members of the Community), they are unfit for *Britiſh Soldiers*, of whom the *Law* requires an acknowledgement of *her ſupremacy*.

For the Law will not excuſe an *unlawful Act* by a Soldier, even though he commits it by *the expreſs Command* of the higheſt military Authority in the Kingdom: and much leſs is the Soldier obliged to conform himſelf *implicitly* to the mere opinions and falſe Notions of Honour, which his Superiors may have unfortunately adopted.—Even in publick military Service, or warlike Expeditions by *National authority*, the Law manifeſtly requires the Soldier *to think for himſelf*; and to conſider, before he acts in any war, whether the ſame be *juſt*; for, if it be otherwiſe, the Common Law of this Kingdom will *impute* to him *the Guilt* of *Murder*.

And though the Law does not actually puniſh ſuch general Crimes, as may unfortunately have obtained, at any time, the Sanction of Government, yet the time will certainly come, when all ſuch

temporizing

temporizing military *Murderers* muſt be reſponſible for the innocent blood that is ſhed in an *unjuſt* War, if they have rendered themſelves *acceſſaries to it by an implicit*, and, therefore, *criminal* obedience to the promoters of it. "Item "fit Homicidium *in Bello*," (ſays the "learned Bracton) "et tunc videndum "utrum *Bellum* ſit *juſtum* vel *injuſtum*. "Si autem *injuſtum*, tenebitur occiſor: "ſi autem *juſtum*, ſicut *pro defenſione* "*patriæ*, non tenebitur, niſi hoc *fecerit* "*corrupta voluntate et intentione*[hh]."

Men of *true honour*, therefore, at the ſame time that they are ſenſible of their duty as *Soldiers* and *Subjects* to their King, muſt be mindful that they are *ſubject alſo to the empire of reaſon*, and are bound thereby, in common with all mankind, to maintain the *dignity* and *natural freedom* of Human Nature: and

[hh] Bracton, Lib. 3. c. 4. *de Corona*, p. 121.

thoſe Soldiers, who, in addition to their *natural reaſon*, have a true ſenſe of *Religion*, will not only be mindful, that they are Soldiers and Subjects to an earthly King, but that they are alſo *Soldiers* and *Subjects* to *the King of Kings*; whoſe Laws and precepts they will, on all occaſions, prefer *to every other Command*; and will obey the ſame with ſuch a *ſteady courage*, as may be equal to every adverſity, and undeſerved ſuffering that threatens them.[ii]

It

[ii] This doctrine is cenſured by a Critic in the Monthly Review for Jan. 1774, who calls it "*a ſtrange Principle!*" In an age of Infidelity, indeed, it may, perhaps, be allowed (in one ſenſe) to be "*a ſtrange principle*"; but then we have the greateſt reaſon to lament the ignorance and depravity of thoſe men who eſteem it ſo in any other ſenſe, than that of being *too often* neglected and tranſgreſſed! For I truſt that no man, who admits or believes the divine authority of the Holy Scriptures, will doubt the *truth of it*. If this "*ſtrange principle*" had not been equally *true*, the Engliſh nation would long ago have been *enſlaved*, and even the very *ſtanding Army*

It was this indiſpenſible, this happy diſpoſition, and ſenſe of *ſuperior duty*, which prevailed even in an unlawful ſtanding Army, that had been *raiſed*, and was *expreſsly deſigned* for arbitrary purpoſes, and which, nevertheleſs, contrary to all expectation, exerted itſelf in ſaving this Kingdom, at the Glorious Revolution, from the Political Slavery, which then threatened it, as well as from the more intolerable Tyranny of the Romiſh Religion.

The Soldier, therefore, who has not *Courage enough* to profeſs, on all occa-

Army itſelf would, by this time, have been reduced to that *abject ſtate* of *political ſlavery*, which diſgraces the *ſtanding Armies* of unlimited Monarchies, and renders them very truly the "*Abomination of Deſolation*," and the *Belluina Poteſtas*, or *power of the Beaſt*, againſt which the vengeance of the *Almighty* is denounced in the Holy Scriptures. See a Note on the word *command*, or *imperium* in p. 59 of my Tract, on the "Means of "national Defence by a free Militia."

ſions, a ſtrict obedience to the *Laws of his Country*, according to the dictates of his *own reaſon* and *Conſcience*, *in preference to every command, and every other opinion whatever*, is unworthy of the Britiſh military ſervice; being qualified rather to be inliſted with the ſlaviſh Troops of *abſolute* Monarchs; or to ſerve in the Black Banditti of the Emperor of Morocco!

But I muſt return once more to the opinions of *the Profeſſors of Law*—"it "is ſaid [kk], that if he who draws upon "another *in a ſudden Quarrel*, make no "paſs at him *till his ſword is drawn*, and "then fight with him, and *Kill him*, is "guilty of *Manſlaughter* only," &c. 1 Hawkins Pleas of the Crown, c. xxxi. § 28. for which he quotes Kelynge 55.

[kk] This opinion is in the true ſtile of a *Tradition*, ſuch as thoſe, by which the Jews of old "*perverted the Law.*"

61. and 131: but *the pretence* for this indulgence is as *frivolous* as the Doctrine is *falſe*, viz, " becauſe (ſays Mr. Hawkins) " that by neglecting the opportu- " nity of Killing the other before he " was on his guard, and in a condition " to defend himſelf, with like Hazard " to both, he ſhewed that his *intent* was " not ſo much to *kill*, as to *combat* with " the other, in compliance with thoſe " *common notions of Honour*," &c.—But is not " *the intent to kill*," or to do ſome bodily harm, and certainly, at leaſt, the Riſque of *Killing*, included in the *intention* " *to Combat*" *with dangerous weapons?* And is it *Juſtice?* Nay! is it *common Senſe* to excuſe a *Notorious Crime*, by the Plea of an *intention* to commit *another Crime* almoſt as bad?

I have already ſhewn, by fair compariſon with a variety of caſes, that the crime of *wilfully ſtriking* or *Combating with*

with weapons in ſudden Anger, is a much more *unlawful act* than many others, wherein even *involuntary and accidental Homicide* has been ſolemnly adjudged *Murder*, and has been generally admitted as ſuch by the Sages of our Law in their Reports; and it will therefore be highly diſgraceful to our Law, but more particularly (becauſe *deſervedly*) to the profeſſors of it, if they ſhould ſtill perſiſt in the *unreaſonable* and *unjuſt* practice of puniſhing *leſſer* Crimes with *more* ſeverity than the *crying Sin* of *voluntary Manſlaughter*, which, as I have already proved in my preface, is abſolutely *unpardonable in this World*, by the Laws of God!

Glory in the higheſt to GOD;
And on Earth PEACE.
Towards Men GOODWILL.

A TABLE of the Authorities and Caſes quoted, or examined in this Book.

Mr.